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No. 93-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993.

JOHN E. FILIOS, ET AL.,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented.

1. Does a State violate 4 U.S.C. § 111 (prohibiting discriminatory taxation of federal officers and employees), when it taxes income received from state, local and federal non-contributory pensions, and exempts only contributory state, local and federal pensions?

2. Is the petition timely as to John and Eleanor Filios?

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the Commissioner of Revenue of Massachusetts submits this brief in opposition to the petition filed by petitioners.

Jurisdiction.

The petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257, to review a final judgment of the Massachusetts Supreme Judicial Court dated July 13, 1993. The application of petitioner John A. Filios to extend time for filing a petition for a writ of certiorari was denied by Justice Souter on October 15, 1993. On October 26, 1993, the Supreme Judicial Court granted the petitioners' motion to amend their notice of appeal to separately name petitioners in

addition to John A. Filios. The petition for a writ of certiorari was served on or about November 17, 1993, more than 90 days after the Supreme Judicial Court's original judgment, but within 90 days of the same Court's October 26 Order. On January 18, 1994, the Clerk sent notice that this case was docketed on November 22, 1993.

Statutory Provisions Involved.

In addition to 4 U.S.C. § 111, cited in the petition for a writ of certiorari, the following sections of the Massachusetts General Laws are involved:

Mass. Gen. Laws c.62, § 2(a):

> Massachusetts gross income shall mean the federal gross income . . . with the following further modifications:—
>
> (1) The items to be added thereto are:—
>
> * * *
>
> (I) Amounts contributed on behalf of the taxpayer pursuant to [the state and municipal pension statute], subdivision (10) of section twenty-two of chapter thirty-two or pursuant to [the judges retirement statute], paragraph (i) of section sixty-five D of said chapter thirty-two and not included in the federal gross income . . . .
>
> (2) The items to be deducted therefrom are:—
>
> * * *

> (E) Income from any contributory annuity, pension, endowment, or retirement fund of the United States government or the commonwealth or any political subdivision thereof, to which the employee has contributed.

Statement.

Massachusetts General Laws c. 62, § 2(a)(2)(E) exempts from the Massachusetts income tax "[i]ncome from any *contributory* annuity, pension, endowment or retirement fund *of the United States government* or the Commonwealth or any political subdivision thereof, to which the employee has contributed." *Id.* (emphasis added). It is undisputed that this exemption benefits all state *and federal* retirees who receive income from "contributory" pension funds. It is also undisputed in this appeal that the military pensions at issue are not "contributory" pensions. Pet. App. A-3. The issue in this case is whether the Massachusetts income tax imposed on pensions received by military retirees nevertheless discriminates against federal officers and employees, in violation of 4 U.S.C. § 111.

Statement of Facts.

Petitioners ("the taxpayers") are all residents of the Commonwealth who received income from the United States military retirement benefits for some or all of the Massachusetts tax years 1985 to 1988. Pet. App. A-45 The amount of income received by each taxpayer was "based on the details of their military service." *Id.* The taxpayers and the Commis-

sioner stipulated below that the United States "military retirement system is a non-contributory system: military personnel do not have a separate, identified amount deducted periodically from their pay and deposited in a segregated retirement fund from which retirement benefits are paid." *Id.* All of the taxpayers paid Massachusetts income taxes on their income from their military pensions. *Id.*

The taxpayers filed applications for abatement of income taxes paid during the tax years 1985, 1986, 1987 and 1988. See Mass. Gen. Laws c. 62C, § 37. In response to a request for an opinion submitted by various military organizations, the Commissioner issued a ruling on February 16, 1989, that military retirement benefits are taxable income under G.L. c. 62 because they are includable in federal gross income and not "contributory" within the exemption established by G.L. c. 62, § 2(a)(2)(E). Pet. App. A-4, A-46.

On March 28, 1989, this Court issued its decision in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. 803 (1989). On May 10, 1989, the Commissioner issued "Technical Information Release 89-6." Pet. App. A-5. See 830 Code of Massachusetts Regulations (C.M.R.) § 62C.3.1(7) (1988 ed.). The Commissioner opined that "[a]ny federal retirement income is exempt from Massachusetts tax if the system is contributory and the employee actually contributed." Joint Appendix in the Massachusetts Supreme Judicial Court at 29.

At various times in late 1989 and 1990, the Commissioner denied each of the applications for abatement filed by the taxpayers. Pet. App. A-7. The taxpayers appealed to the Massachusetts Appellate Tax Board, which upheld the Commissioner's decision. Pet. App. A-2. See Mass. Gen. Laws c. 62C, § 39; c. 58A, § 7.

On July 13, 1993, the Supreme Judicial Court of Massachusetts affirmed the Board. *Filios* v. *Commissioner of Revenue*, 415 Mass. 806, 615 N.E.2d 933 (1993), Pet. App. A-44 to 51. The Court agreed with the Commissioner and the Board that the distinction in Massachusetts tax law between contributory and non-contributory pensions "creates significant differences between the two classes of taxpayers such that differential treatment does not violate 4 U.S.C. § 111." Pet. App. A-47. It concluded "that the distinction between contributory and noncontributory pensions systems was a valid one", which did "not impose the tax based on the source of the income" and was not discriminatory. *Id.*, A-50. The Court also ruled that, due to a defect in the notice of appeal, "[t]he only appeal before us is that of John E. and Eleanor G. Filios." *Id.*, A-45, n.2.

On October 12, petitioner John E. Filios (but not Eleanor G. Filios) filed in this Court an application to extend the time to file a petition for a writ of certiorari. The application was denied by Justice Souter on October 15, 1993.

On October 26, the Supreme Judicial Court of Massachusetts granted the petitioners' request to reconsider their motion to amend the notice of appeal to name separately 27 [sic] individuals not named in the notice of appeal (i.e. all parties other than John Filios). Pet. App. A-52. The petition for a writ of certiorari was served on or about November 17, 1993.

Summary of Reasons for Denying Petition.

1. There is no conflict among Circuit Courts, State Courts or decisions of this Court. Nor does any tension exist between Massachusetts' taxation of pensions and the non-discrimination principles of 4 U.S.C. § 111. Massachusetts taxpayers may deduct income from federal (as well as state and local) pensions for state income tax purposes, if the pension plan is contributory and the taxpayer has contributed to the plan. Massachusetts does not discriminate because of the source of the income; it distinguishes solely between contributory and non-contributory plans.

2. The factual record here fails to sustain a claim under §111, let alone present any issue of national significance. Petitioners cite a "grandfather clause" solely in Massachusetts law for persons allegedly now living, if any, who were employed as police and fire employees in Massachusetts in the mid-1930's who elected not to join the contributory system enacted at that time. They failed, however, to prove that any living person was benefiting from that clause. Similarly, their argument that Massachusetts' state pension system is 10% contributory merely shows that, like any contributory system, the Massachusetts plan involves contributions by the employer as well as employees. Nothing in this arrangement shows any discrimination against federal pensioners, whose proportionate contribution is not even shown in the record.

Reasons for Denying Petition.

Under Supreme Court Rule 10, "review on Writ of Certiorari is not a matter of judicial right but of judicial discretion," and "will be granted only where there are special and important reasons therefor." The purpose of certiorari writs is to permit the Court to select cases of "such gravity and general importance" as to warrant full court review. *In Re Woods*, 143 U.S. 202, 206 (1892). For the reasons stated below, the petition does not satisfy the criteria that guide the Court's discretion to review a case. Accordingly, the petition should be denied.

I. THE COMMONWEALTH'S TAX STATUTES CONFORM TO FEDERAL ANTI-DISCRIMINATION STATUTES.

In the conceded absence of a conflict between decisions of the Courts of Appeals, State Courts, or this Court, the only question is whether petitioners have raised an issue of national importance. Their sole argument to that effect is based upon alleged violation of 4 U.S.C. § 111.

The question under 4 U.S.C. § 111 is whether the Massachusetts system discriminates against the plaintiff taxpayers "because of the source of the pay or compensation." This clause codifies the nondiscrimination component of the federal constitutional doctrine of intergovernmental tax immunity, which "barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals." *Davis*, 489 U.S. at 812 (quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)).

During the tax years at issue in this appeal, Massachusetts

permitted the deduction from gross income of payments received from any contributory "retirement fund of the United States government". Massachusetts thus permits deductions not only by state contributory retirees, but also by "federal retirees who contributed to their benefits, such as members of the Central Intelligence Agency, Foreign Service, bankruptcy judges and United States magistrates." See *Barker* v. *Kansas*, 112 S.Ct 1619, 1626, n.5 (1992). See also Mass. Dept. of Rev. Letter Ruling 83-38, reprinted in Official MassTax Guide, Personal Income Tax, p. 592 (West 1992)(exemption for contributory annuity received by civilian employee of the Army and Air Force Exchange Service); Joint Appendix in the Massachusetts Supreme Judicial Court at 39 (plaintiffs acknowledge that certain federal civil service retirement benefits are exempt from Massachusetts taxation).

A tax on non-contributory pensions, combined with an exemption for contributory pensions, does not discriminate against the federal government or its employees. Contributory federal pensions receive the same treatment as contributory state pensions. G.L. c. 62, §§2(a)(1)(I). This fact pattern does not bring this case within recent decisions of this Court striking down state taxation laws. Neither of the cases cited by petitioner involved a consistently-applied distinction between contributory and non-contributory pensions, regardless of their source. *Davis*, 489 U.S. at 805; *Barker*, 112 S.Ct. at 1626, n.5.

Davis, 489 U.S. at 816, and *Barker*, 112 S.Ct. at 1622, held that States may lawfully tax pensions differently if there are "significant differences" between the pensions. A retiree who contributed to a pension plan paid consideration and has her own money funding the system, while a non-contributory

retiree does not. In practice, in Massachusetts, there is an additional difference, namely the exposure of the employee's contributions to state taxation at the time of the contributions, through inclusion in Massachusetts gross income. If "significant differences" do not include distinctions based upon employees' payment of consideration to the employer's pension fund and payment of state income tax, then it is hard to imagine what differences might be considered significant enough to warrant different treatment of classes of pensions. At the very least, "[p]rinciples of federalism" require Congress to speak more clearly than it has here, if it intended to set such novel and strict "limits upon the taxation authority of state government, an authority [the Supreme Court has] recognized as central to state sovereignty." See *Department of Revenue of Oregon* v. *ACF Industries, Inc.*, ___ U.S. ___, 62 U.S.L.W. 4097, 4100 (Jan. 24, 1994).

In short, unlike Michigan and Kansas, Massachusetts exempts all federal contributory pensions from state taxation. Since state and federal contributory systems are treated equally, as are non-contributory systems, there is no discrimination or inconsistent treatment, and § 111 does not come into play. See *Werner Machine Co., Inc.* v. *Director of Division of Taxation*, 350 U.S. 492, 493-94 (1956)("Since the tax remains the same whatever the character of the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations."). *Doneski* v. *Comptroller of the Treasury*, 91 Md. App. 614, 605 A.2d 649, 656 (1992), *cert. denied*, 327 Md. 523, 610 A.2d 796 (1992), *cert. denied*, 113 S. Ct. 981 (1993).

II. THE PETITIONERS' ATTACKS ON THE MASSACHUSETTS TAX SYSTEM DO NOT INVOLVE QUESTIONS OF NATIONAL IMPORTANCE AND RAISE ISSUES OF STATE LAW UPON AN INADEQUATE FACTUAL RECORD.

1. The taxpayers assert (Pet. at 12-13) that Massachusetts' system is not contributory because the benefit levels are, allegedly, funded 90 percent by the state and approximately 10 percent by employee contributions. This argument appears to depend upon splitting the state benefits into two components—one contributory and one non-contributory. But state law, as applied by the Supreme Judicial Court in this case, treats the entire benefit package as one pension. To the extent that petitioners argue otherwise, they are merely disagreeing with the state's highest Court on an issue of state law.

The Commonwealth's approach, in any event, is consistent with the usual understanding of the phrase "contributory" pension, in which "employees, *as well as employers*, make payments to a pension fund". Black's Law Dictionary (6th ed.), p. 329 (emphasis added). See generally 29 U.S.C. §§1054(c), 1056(c)(ERISA provisions contemplating employer contributions); Canan, *Qualified Retirement and Other Employee Benefit Plans*, § 3.51, pp. 135-136 (West 1992).

Under the state law definition of contributory plan set forth in the Commissioner's Technical Information Release ("TIR") 92-3 and endorsed by the petitioners below (though not in this Court, see Pet. at 15), the question is whether employee contributions are included in Massachusetts gross income. Massachusetts *does* include the pension plan contributions of its state and local employees in gross income for state tax purposes. Mass. Gen. Laws. c. 62, § 2(a)(1)(I), quoted above, p. 2.

The state taxation system under attack here thus treats the contribution consistently as being paid from the state and local employees' income. Petitioners concede as much (Pet. at 14 and n. 11). The fact and degree of participation by the employer in funding benefits therefore is irrelevant.

The petitioners also offer no evidence that all federal retirement benefits are funded 100 percent by employee contributions, nor do they discuss in any way the degree of employee contribution or other features of federal contributory pension plans. This failure of proof is fatal to their contention that federal pensions are treated differently from state pensions. Such a fact-bound issue is not appropriate for Supreme Court review.

In short, the petitioners have not provided any basis for disregarding the fact, found by the Board, that the exempt state (and local) pensions are contributory, and their pensions are not.

2. Petitioners also argue that there exists an obscure exemption for certain police and fire employees, if any, whose employment predated the 1930's and 1940's. It is an enormous stretch for petitioners to call this a "state policy" of exemption. Indeed, petitioners' virtual concession that they cannot show an "active and significant class" of exempt retirees, even in Massachusetts (Pet. at 10-11), leads directly to the conclusion that this issue is not "significant", let alone one of national importance such as to warrant review by this Court.

The state provision in question exempts from taxation any pension received on account of service by local "police and fire department" employees who were so employed before establishment of the contributory retirement system *and* who did not elect to join the contributory retirement system. Mass. St.

1973, c. 876, § 1. This provision is a "grandfather clause" for police and fire employees whose employment predated the state legislation in the 1930's and 1940's that made all public retirement systems mandatory. There is no claim that such a provision exists in other States.

Petitioners' attempt to base their serious charge of discrimination upon this trivial exception fails for lack of proof. The Massachusetts Appellate Tax Board noted correctly that "[i]f there were enough [qualifying members of local police and fire departments] surviving in 1973 to justify continuing the exemption (St. 1973, c. 876, s.1), there was no evidence [that] even a few of them are still taking advantage of the exemption." Pet. App. A-35. The petitioners respond only with speculation that "only a limited number of retirees may still benefit" from the exemption. (Pet. at 11). In the absence of any evidence of current exempted retirees, there was simply no proof of discrimination, and there is no record support for petitioners' claims in this Court, much less any indication of an issue of national importance.

More generally, the petitioners do not argue that the system of *exemption* for contributory pensions is in any way under- or over-inclusive. They only argue that *taxation* of non-contributory pensions is very minimally under-inclusive. The validity of state law must turn upon the overriding and overwhelming effect of the law as a whole, that is, "the generality of cases, not the rare exceptions." See *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976)(discussing constitutional procedural due process analysis); *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975)(evaluating federal legislation under the rational basis

test)[1].

In short, petitioners' claims failed in state court for simple lack of proof, not for any legal reason raising issues of national importance warranting review by this Court.

III. THE PETITION IS UNTIMELY, AT LEAST AS TO JOHN AND ELEANOR FILIOS.

John E. and Eleanor G. Filios were parties to the Supreme Judicial Court's decision, issued on July 13, 1993. *Filios*, 415 Mass. at 807 n.2, 615 N.E.2d at 933 n.2, A-45 n.2. These two parties, at least, had a right to apply for certiorari for 90 days thereafter, until October 9, 1993, pursuant to Supreme Court Rule 13. John, but not Eleanor, Filios applied for an extension of time to file the petition, which was denied by Justice Souter on October 15, 1993. While the Massachusetts Supreme Judicial Court's order allowing the motion to amend the state court notice of appeal arguably gave other parties 90

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[1] Moreover, the Commonwealth need not justify its entire system of taxing pensions, since the taxpayers here cite, as alleged proof of discrimination, only the exemption for certain "grandfathered" police and fire employees, if any survive. It is enough, therefore, if the Commonwealth can justify the grandfather clause. The purpose of this grandfather clause is obviously to protect the expectations of certain local employees who had entered the public service with the understanding that their non-contributory pension would not be taxed by the state. Such a purpose meets even the heightened scrutiny for gender-based classifications under the Federal Equal Protection Clause. See *Heckler v. Mathews*, 465 U.S. 728, 744-48 (1984). The rationale upholding "grandfather" provisions under intermediate scrutiny for gender-based distinctions applies *a fortiori* to this case, which involves the less searching standard: whether the differences between taxable and exempt pensions are "significant."

days to file a petition for certiorari, it cannot be held to have extended the time for the two original parties, John and Eleanor Filios. Their petition, filed on November 22, was untimely.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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